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No. 02-308

IN THE

Supreme Court of the United States

NICK MARINO,
Petitioner,

vs.

KENOFF & MACHTINGER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JONATHAN B. COLE
Counsel of Record

NEMECEK & COLE

15260 Ventura Boulevard, Suite 920
Sherman Oaks, California 91403
(818) 788-9500

Counsel for Respondent
KENOFF & MACHTINGER

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PARTIES TO THE PROCEEDING

Petitioner is Nick Marino, an individual member of the Writers Guild of America.

Respondent is Kenoff & Machtinger, a California partnership.

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INTRODUCTION

The Petition for Writ of Certiorari (the "Petition") filed by Nick Marino ("Marino"), in Pro Se, should be summarily denied because:

(a) The California Court of Appeal neither decided an important question of federal law that has not been, but should be, settled by this Court nor decided an important question of federal law in a way that conflicts with the relevant decisions of this Court.[1]

(b) The California Supreme Court did not decide an important federal question in conflict with the Ninth Circuit's decision in *Marino v. Writers Guild of America, East, Inc.*, 992 F. 2d 1480 (1993) (the "Ninth Circuit Decision").

STATEMENT OF THE CASE

A. The 1990 WGA Credit Arbitration

Marino claims that he was entitled to receive writing credit on the motion picture entitled "The Godfather: Part III" ("GF III"). In 1990, Marino was a party to a credit arbitration before the Writer's Guild of America, West, Inc. (the "WGA") concerning GF III (the "WGA Credit Arbitration"). WGA credit arbitrations consist of three phases. In Phase 1, written materials are assembled for the Arbiters who make the credit decision at Phase 2. On November 5, 1990, the Arbiters made their decision that Francis Ford Coppola and Mario Puzo should receive writing credit. Marino appealed the Arbiters decision at Phase 3, and after further consideration by one of the Arbiters regarding a certain literary material, Marino lost.

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[1] After the Court of Appeal decision, Marino filed a Petition for Review with the California Supreme Court. The California Supreme Court denied Marino's Petition for Review.

B. The WGA Credit Lawsuit, the Legal Malpractice Lawsuit and Summary Judgment No. 1

On December 12, 1990, Marino filed a lawsuit against the WGA seeking a declaration awarding him a writing credit on GF III (the "WGA Credit Lawsuit"). The WGA removed the WGA Credit Lawsuit to federal court and then filed a motion for summary judgment which was granted against Marino.

Marino then appealed to the Ninth Circuit. The Ninth Circuit affirmed the grant of summary judgment in favor of the WGA and against Marino.

On July 22, 1994, Marino sued Kenoff & Machtinger ("K&M") for legal malpractice (the "Malpractice Lawsuit") in the Los Angeles Superior Court. Marino decided to file the Malpractice Lawsuit in state court. Marino then proceeded to litigate the Malpractice Lawsuit in state court for over eight years.[2]

In August of 1997, K&M filed a motion for summary judgment in the Malpractice Lawsuit ("SJ No. 1"). SJ No. 1 was granted in favor of K&M and against Marino. Marino appealed. The California Court of Appeal affirmed, in part, and reversed, in part.

C. Summary Judgment No. 2

On December 8, 1999, after remand, K&M filed another motion for summary judgment ("SJ No. 2"). In January of 2000, the trial court granted SJ No. 2, in part, and denied it, in part. The trial court ruled that there was a triable issue as to the purpose and scope of a Phase 1 Hearing in the WGA Credit Arbitration as that term is defined in the Credits Manual

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[2] K&M is the sole remaining Defendant in the Legal Malpractice Lawsuit.

as approved by the WGA and its membership (the "Phase 1 Hearing Issue").

D. The 5-Day Bench Trial

The Los Angeles Superior Court conducted a 5-day bench trial concerning the Phase 1 Hearing Issue. The court heard testimony from representatives of the WGA and from outside experts concerning the interpretation of the Credits Manual and the nature, scope, purpose and effect of a Phase 1 Hearing. On April 26, 2000, the trial court issued its written decision and concluded that the credit determination of who was the genesis of creative ideas found in the final shooting script is a Phase 2 function, not a Phase 1 function. Further, the trial court reasoned that it would not make sense (or promote the stated goal of a swift determination of credit) to conduct a credit determination twice (once at Phase 1 and again at Phase 2). Judgment was entered against Marino on August 9, 2000. Marino filed a Notice of Appeal.

E. Marino's Appeal and Subsequent Petitions

On December 10, 2001, the California Court of Appeal affirmed the trial court's ruling. See Appendix A to Marino's Petition. On December 24, 2001, Marino filed a Petition for Rehearing before the Court of Appeal. On January 7, 2002, the Petition for Rehearing was denied. On January 22, 2002, Marino filed a Petition for Review before the California Supreme Court. On March 13, 2002, the Petition for Review was denied. The instant Petition before this Court followed.

ARGUMENT

A. Marino's Malpractice Lawsuit, Which He Chose To File In State Court, Is Not A Claim Arising Under Section 301(a) Of The LMRA And His Claim That The Trial Court Acted In Excess Of Its Subject Matter Jurisdiction Is Without Merit

(1) Marino makes an inconsistent argument. In his Petition, at pages 11-12, Marino argues that the trial court acted in excess of its jurisdiction by interpreting a collective bargaining agreement ("CBA"). However, Marino himself, on page 12 of his Petition, quotes from the Ninth Circuit Decision in which the Ninth Circuit held that "[t]he procedures for arbitration of credit disputes are set out in WGA's 'Credits Manual.' They are not part of the collective bargaining agreement, but are approved by WGA's board of directors and by vote of its membership." The Ninth Circuit drew a distinction between the general rules for determining credit, which are part of a CBA, and the arbitration procedures of credit disputes set forth in the Credits Manual, which are not part of a CBA. Thus, Marino's argument that the trial court exceeded its jurisdiction when it supposedly interpreted a CBA is devoid of merit, since the trial court interpreted the Credits Manual, not a CBA.

(2) Even if this case involved the interpretation of a CBA, instead of the interpretation of the Credits Manual, federal preemption does not apply where the interpretation of a CBA arises in connection with the *defense* of a state law claim. It is well settled that when a *defense* to a state law claim is based on the terms of a CBA, a state court is permitted to interpret that agreement in order to adjudicate the defenses raised in the state law claim. *Caterpillar, Inc. v. Williams*, 482 U.S. 386,

398-399, 107 S.Ct. 2425, 2433 (1987). As this Court has heretofore decided:

> "It is true that when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question, even a Section 301 question, *in a defensive argument* does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint ... and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court." (Emphasis added.) *Caterpillar v. Williams*, 482 U.S. at 398-399, 107 S.Ct. at 2433.

Pratt v. Paris Gas Light & Coke Co., 168 U.S. 155, 18 S.Ct. 62 (1897) [state court not deprived of power to determine questions arising under patent laws]. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483-84, n,12, 101 S.Ct. 2870 (1981) [this Court holds that "exclusive federal jurisdiction will not prevent a state court from deciding a federal question collaterally even if it would not have subject matter over a case raising the question"]. *Pan Am. Petroleum Corp. v. Superior Court*, 366 U.S. 656, 663, 81 S.Ct. 1303 (1961) [approving state court adjudication of defense based on Natural Gas Act].

(3) Marino's case is a garden variety tort claim (a legal malpractice action) arising under state law. It does not raise a federal question. Moreover, it is not an action for violation of a contract between an employer and a labor organization

and therefore Section 301(a) of the Labor Management Relations Act ("LMRA") does not even apply.

(4) Marino chose the state court forum. Marino decided to file the Malpractice Lawsuit in state court and he litigated his claim in state court for over 8 years. Now that Marino has received adverse rulings in state court, he raises objections to the jurisdiction of the very court that he chose, the Los Angeles Superior Court. Moreover, Marino fully participated in the trial, wherein he called expert witnesses to testify as to their interpretations of the Credits Manual. At no time did Marino assert before the trial court or before the Court of Appeal that those courts were without subject matter jurisdiction to interpret the relevant provisions of the Credits Manual. Marino's assertion now, after losing in the trial court and the California Court of Appeal, that the trial court engaged in an interpretive exercise reserved for the federal courts under Section 301 is disingenuous and devoid of merit. Marino should be estopped to even make such an argument at this point in time.

(5) Marino's malpractice claim does not turn on the interpretation of a CBA. His complaint simply alleges that K&M breached its duty of care in providing legal services to Marino by, among other things, failing to request a Phase 1 Hearing, thereby causing Marino to lose screenwriting credit. In its defense, K&M argued that its failure to request a Phase 1 Hearing could not have caused Marino's alleged damages. This defensive argument required the trial court to interpret the Credits Manual with respect to the scope and purpose of a Phase 1 Hearing. After a five day trial, the trial court ruled that the failure to request a Phase 1 Hearing could not possibly have caused Marino any damages. The California Court of Appeal affirmed. The California Supreme Court then denied review.

B. The California Judgment Is Consistent With, And Is Not In Conflict With, The Ninth Circuit Decision

(1) The Ninth Circuit Decision and the trial court decision (later affirmed by the California Court of Appeal) are consistent with each other. The Ninth Circuit Decision held that the WGA Credits Arbitration system is fundamentally fair because it contains various procedural safeguards. *Marino*, at 1484–1485. The Ninth Circuit Decision provides that a Phase 1 Hearing allows for confrontation and other evidentiary rights. *Marino*, at 1485.[3] However, the Ninth Circuit never reached the issue of what is proper Phase 1 Hearing subject matter. That issue was not before the Ninth Circuit in the Ninth Circuit Decision. In contrast, in the Malpractice Lawsuit, the trial court had to determine what is the proper subject matter for a Phase 1 Hearing. Therefore, the two decisions cannot possibly be in conflict because each addresses different issues.

(2) Both the Ninth Circuit and the trial court agree that a Phase 1 Hearing allows for due process rights. However, as the trial court ruled (and as affirmed by the California Court of Appeal), a Phase 1 Hearing can only be conducted as to certain issues. As the trial court ruled, a Phase 1 Hearing is proper to determine who "put pen to paper" so as to make sure that the correct literary materials are sent to the Arbiters at Phase 2. It is the Phase 2 Arbiters who then determine which screenwriters contributed which creative ideas and dialogue for the purposes of determining credit. In short, and as the trial court so ruled and as the Court of Appeal affirmed,

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[3] As the Ninth Circuit stated: "The former [a Phase 1 Hearing], of course, provides for all of the usual confrontation and evidentiary rights." The Ninth Circuit Decision contains no other reference to the nature, scope or purpose of a Phase 1 Hearing.

the credit determination function takes place at Phase 2, not at Phase 1.

(3) Marino argues, in his Petition at page 6, that after hearing evidence from many witnesses, including experts, the trial court issued its findings that the CBA procedures described by the Ninth Circuit did not, in fact, exist. This is a misstatement by Marino. The trial court never made any such finding. In fact, after conducting a bench trial on the Phase 1 Hearing Issue, the trial court found that a full Phase 1 Hearing is available to resolve disputes as to the authenticity, identification, sequence, authorship or completeness of literary materials to be submitted to the Phase 2 Arbiters for consideration. The trial court findings complement and clarify the Ninth Circuit description of a Phase 1 Hearing and confirm the plain meaning of the Ninth Circuit's ruling with respect to the arbitration procedures described in the Ninth Circuit Decision. As such, the trial court judgment in this case is not, in any way, in conflict with the Ninth Circuit Decision.

(4) Marino argued before the trial court that the WGA Credit Arbitration was unfair because he never knew the identities of the Arbiters who made the credit decision at Phase 2 (the "Anonymity of the Arbiters"). The trial court rejected this argument by Marino and granted K&M's motion for summary judgment on this issue. The Court of Appeal affirmed. This decision is likewise consistent with the Ninth Circuit Decision.

(5) In the Ninth Circuit Decision, the Court upheld the procedures of the WGA Credit Arbitration as fair and reasonable, but with one exception. The one exception was the claim of arbiter bias. The Ninth Circuit did not reach the issue of arbiter bias because those claims were not raised by Marino until after the Arbiters had ruled against him. Inasmuch as the Ninth Circuit simply did not reach the Anonymity of the Arbiters issue, then, at some point in the

Malpractice Lawsuit, the trial court had to reach that issue. The trial court did reach that issue, and did grant summary judgment as to that issue, because it was bound to follow *Ferguson v. WGA*, 226 Cal.App.3d 1382, 1389-1390 (1991) in which the California Court of Appeal ruled that the Anonymity of the Arbiters was a fair and reasonable procedure supported by important policy considerations. Thus, even if Marino had objected to the Anonymity of the Arbiters prior to the commencement of the arbitration (and it is undisputed that he made no such objection), the objection would have made no difference because the WGA arbitration procedure based on the Anonymity of the Arbiters had already been held to be proper.

(6) In addition, in *Ferguson*, the California Court of Appeal also held that claims relating to a WGA Credit Arbitration are nonjusticiable and are not subject to judicial review. Similarly, under California law in general, arbitrations are not subject to judicial review. *Moncharsh v. Heily & Blase*, 3 Cal.4th 1 (1992). Marino's real goal in this case is to circumvent *Moncharsh* and the finality of the WGA Credit Arbitration system, which is binding on all WGA members (like Marino).

CONCLUSION

K&M respectfully requests that the Petition be denied.

Dated: September 27, 2002.

Respectfully submitted,

NEMECEK & COLE

JONATHAN B. COLE
Counsel of Record

Counsel for Respondent
KENOFF & MACHTINGER